Supreme Court, U.S.
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Supreme Court of the United States

No. 1401 Term, 1971

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BAGEL BAKERS COUNCIL OF GREATER NEW YORK AND ITS EMPLOYER-MEMBERS,
Respondents and Cross Petitioners,

BAGEL BAKERS COUNCIL OF GREATER NEW YORK AND ITS EMPLOYER-MEMBERS,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Bagel Bakers Council of Greater New York and its employer-members prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on November 20, 1970 and December 24, 1970, respectively. Review is requested of that part of the opinion and judgment as orders enforcement of an order of the National Labor Relations Board with regard to the complaint of Local 338 of the Bagel Bakers Union.

Opinion Below

The opinion of the Court of Appeals is not yet officially reported (CCH 64 LC Par. 11309) and is printed herein in Appendix A, pages 1a thru 15a.

Jurisdiction

The judgment of the Court of Appeals was entered on December 24, 1970 and is printed herein in Appendix B, pages 16a thru 21a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

Following an impasse in bargaining and a substantial loss in business, various employers, members of a council, locked out the bagel bakers.

The Council had bargained for its members, but the members clearly indicated that they were not bound by the bargaining and at all times signed individual agreements. The union agreed with this position.

The questions presented herein relate to the bargaining, the lockout and the trial before the Trial Examiner of the National Labor Relations Board.

These questions are:

1. Did the Council engage in multi-employer bargaining with Local 338 of the Bagel Bakers Union?

Without the finding of multi-employer bargaining, there would be no jurisdiction over the respondent.

2. Did the acts of the employers constitute an illegal lockout of Local 338?

The determination of the United States Court of Appeals seeks to change the rule enunciated by the Supreme Court in American Shipbuilding v. National Labor Relations Board, 380 U.S. 300.

3. Was there a fair trial?

Did the act of the Trial Examiner in refusing a continuance of 30 days to allow Glass to testify, constitute an abuse of discretion so as to constitute a denial of due process?

Statement of the Case

On application of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.) for enforcement of its Order issued against the Bagel Bakers Council of Greater New York and its employer-members on February 19, 1969, and reported at 174 NLRB No. 101 and on the Council's petition for review of the same order, the Court of Appeals granted enforcement with regard to Local 338 of the Bagel Bakers Union and denied enforcement with regard to Local 802 of the Bakery Drivers Union.

Reasons for Granting the Writ

1. The United States Court of Appeals for the Second Circuit in finding a multi-employer bargaining unit, in the case at bar, stated the test to be as follows:

"The validity of a multi-employer unit

> depends not only upon the intent of the employer, (to bargain together), but the acceptance of the group unit by the union."

This criteria is contrary to the test as enunciated by the National Labor Relations Board. In Point I of its Brief in the case at bar before the United States Court of Appeals for the Second Circuit, the National Labor Relations Board argued that the test of a multi-employer bargaining unit is "...The members of the group have indicated from the outset an unequivocal intention to be bound by group rather than individual action." In support of its position, the National Labor Relations Board cited the case of NLRB v. Sheridan Creations, Inc., 357 Fed. 2d 245, cert. denied, 385 U.S. 1005. See also Remo's Pizza, 1970 CCH, NLRB Par. 22,510, in which the National Labor Relations Board held that notwithstanding group bargaining, there was no true multi-employer unit since the employers (as in the case at bar):

> (1) signed separate copies of the negotiated agreement;
>
> (2) engaged in group bargaining for the convenience of the parties;
>
> (3) did not indicate from the outset an intention to be bound by group rather than individual action.

The Court of Appeals for the Second Circuit, in the instant case, has now set forth new criteria and changed the criteria as previously applied by it and as is being applied by the National Labor Relations Board. The Supreme Court of the United States should de-

termine the proper criteria for a finding of multi-employer bargaining. In the case at bar, there was no finding by the United States Court of Appeals that the employers intended to be bound by group action; at best there was a finding that they bargained together.

There is also a conflict between different Circuits which the United States Supreme Court should resolve. The Court of Appeals of the District of Columbia presently states the criteria to be "...an unequivocal intention to be bound in collective bargaining by group rather than individual action...and the union has assented...." Western States Regional Council 3 v. National Labor Relations Board, 398 Fed. 2nd 770.

In that case the United States Court of Appeals for the DC Circuit found an employer association with by-laws providing for group bargaining binding on the employer members. There were also letters by each of the employers to the union authorizing binding bargaining by the association.

In the case at bar, the National Labor Relations Board applied (notwithstanding its criteria as enunciated in its brief) as a sole test regarding multi-employer bargaining, only the intention of the employers to bargain together. There was unrebutted evidence in the record that the employers never intended to be bound by council bargaining, that Local 338 did not recognize the council, made no contact with the council, dealt with and made contracts only with the individual employers. The United States Court of Appeals in granting enforcement with regard to the complaint of Local 338 completely disregarded this evidence.

See also the recent case of W.F. Mosley Contracting, Inc., 1970 CCH, NLRB Par. 22106.

In that case the National Labor Relations Board found that an employer did not violate his bargaining duty by refusing to sign an agreement that had been agreed to by other employers, who, with the employer, had previously bargained with the union and paid dues to an employer association. The employer had not given the association authority to enter into a contract without his consent.

The above fact pattern is found in the case at bar. The employers did not meet the test of multi-employer bargaining as stated by the National Labor Relations Board. The Court of Appeals then changed the test so as to eliminate any requirement that the employers agree to be bound by group bargaining and made the sole test: did they bargain together?

The question presented is of profound significance in national labor law. Consideration by this Court is necessary on the ground that the holding below conflicts squarely with the decisions of other circuits and substantially with the rule of the National Labor Relations Board. This decision is of great public importance and presents a substantial impact on labor law.

2. The decision of the Court below conflicts with decisions of this court on important issues. The United States Court of Appeals, in the case at bar, is seeking to change the rule as enunciated by this court in American Shipbuilding. This court has determined that it is not an unfair labor practice for an employer to lock out its employees in support of

its bargaining position. The United States Court of Appeals for the Second Circuit seeks to get around this policy by finding bad faith bargaining. In the case at bar, since the charges of bad faith bargaining relate to that part of the bargaining which took place subsequent to the alleged lockout, it can have no affect on the validity of the lockout. In any event, the Court of Appeals is whittling away the rule of American Shipbuilding. The Court of Appeals' opinion in the case at bar would seriously confine and limit the doctrine of American Shipbuilding. We suggest that the same as a union can strike, an employer has the weapon of a lockout in support of its bargaining position. The National Labor Relations Board cannot use the subsequent bargaining by the employer to show that the prior lockout was illegal. The Court of Appeals has fallen into serious error and is still acting as if this court had not decided American Shipbuilding.

3. With regard to the claim of a failure of a fair trial, the United States Court of Appeals has completely overlooked the applicability of the Administrative Procedures Act with regard to proceedings by the National Labor Relations Board. The Board's actions with regard to Nelson Bagel Bakery (an employer against whom no charges were filed and yet a violation found) and the failure to grant a continuance so as to allow the testimony of Glass (the President of the Council who was undergoing surgery) was clearly a deprivation of due process.

See Universal Camera Corp. v. National Labor Relations Board, 19 LC 66, 191, 340 U.S. 474.

Conclusion

For the reasons stated above, the decision of the Court of Appeals in the instant case (on an important phase of Labor Law) which is in conflict with the decision of another circuit and seeks to evade following the decision of this court in American Shipbuilding, should be reviewed by this court and this Petition for a Writ of Certiorari should be granted.

Dated: February , 1971.

Respectfully submitted,

LEON BRICKMAN
Attorney for Respondents and
Cross-Petitioners
Bagel Bakers Council of
Greater New York and Its
Employer Members

APPENDIX A
Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 36, 37—September Term, 1970.

(Argued September 21, 1970 Decided November 20, 1970.)

Docket Nos. 34159, 34186

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—against—

BAGEL BAKERS COUNCIL OF GREATER NEW YORK AND ITS EMPLOYER-MEMBERS,

Respondents.

BAGEL BAKERS COUNCIL OF GREATER NEW YORK AND ITS EMPLOYER MEMBERS,

Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondents.

Before:

LUMBARD, *Chief Judge,*
ANDERSON and FEINBERG, *Circuit Judges.*

Petition for enforcement of National Labor Relations Board order finding various employers, through Bagel

Bakers Council of Greater New York, had failed to bargain in good faith with Bagel Bakers Union and had unlawfully locked out employee members of both that union and Bakery Drivers Union. Cross-petition for review of same order. Order against employers enforced with respect to Bakers Union; reversed with respect to Drivers Union.

LEON BRICKMAN, Brooklyn, New York, *for Bagel Bakers Council and its Employer-Members.*

ELLIOTT MOORE, Attorney (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Michael Messitte, Attorney, on the brief), *for National Labor Relations Board.*

FEINBERG, *Circuit Judge*:

The National Labor Relations Board petitions for enforcement of its order, which found that the Bagel Bakers Council of Greater New York and its employer-members had failed to bargain in good faith with Bagel Bakers Union Local 338 and had unlawfully locked out employee members of that Local and of Bakery Drivers Union Local 802.[1] The Council cross-petitions for review of the same order. We enforce the order of the Board as to violations with respect to Local 338. We reverse the Board's determination with respect to Local 802.

1 Local 338 is affiliated with the Bakery and Confectionery Workers International Union of America; Local 802 is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Opinion

I.

Each of the respondent employers manufacturers and sells bagels, which may be technically described as hard rolls shaped like doughnuts, although such a description is like calling a sunset a collection of colors.[2] Respondents are all members of the Bagel Bakers Council, which was formed some years ago for social reasons and to aid the member employers in discussing common problems. Just how much aid the Council was to furnish and on what problems are important issues in the litigation because their resolution determines a basic jurisdictional issue. The Board concedes that its monetary standards for asserting jurisdiction would be met only if the individual businesses were part of a multiemployer bargaining unit. Therefore, we must consider first the Board's finding that the Council members engaged in multiemployer bargaining with Local 338.

Among the subsidiary findings of the Board on this issue were the following: For some years a committee of Council members, headed by Council President and full-time employee Isidore Glass, had negotiated collective bargaining agreements with the unions representing employees of Council members. When agreement was reached, the practice was for the contract to be approved by the Council and then signed by the individual members.[3] When Local 338 struck three shops in 1966, the members of the Council dealt jointly with Local 338 through the Council, even though the union protested that its con-

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2 Leo Rosten in "The Joys of Yiddish" (1968), p. 26 says:

> If you have never tasted a *bagel*, I feel sorry for you. *Bagels* are known as doughnuts with a college education . . . .

3 Non-members of the Council would also sign the same agreement, which became in effect an industry-wide contract.

tract was with individual employers, not with the Council. In addition, the Council's Financial Secretary admitted that in bargaining for the 1967 contract, which led to the unfair labor practice findings now under review, the Council committee was seeking for Council members a contract that would be "one for all and all for one." Based upon this and other evidence, the Board found that the business of respondent employers was properly considered collectively.

In determining whether a multiemployer unit was appropriate, the standard applied by the Trial Examiner, and affirmed by the Board, was

> whether Respondent employers have expressly or by implication indicated their intention to be bound in collective bargaining by group, rather than individual action.

In other cases, the Board has stated the test somewhat differently, adding as an integral part thereof the question whether the union "has been notified of the formation of the group and the delegation of bargaining authority to it, and has assented and entered upon negotiations with the group representative." See, e.g., *Weyerhauser Co.*, 166 N.L.R.B. 299 (1967). The test phrased in that manner was specifically approved by the Court of Appeals for the District of Columbia in Western States Regional Council No. 3, *International Woodworkers of America* v. *NLRB*, 398 F.2d 770, 773 (1968). We have impliedly accepted the proposition that the validity of a multiemployer unit depends not only upon the intent of the employers but the acceptance of the group unit by the union. See *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 340 F.2d 690, 693 (2d Cir. 1965). Therefore, it might be argued that

the test used by the Board here was inadequate since it ostensibly focussed only on the intention of the employers. However, such an objection would be undue formalism on this record since the Board made subsidiary findings, which showed union acceptance of the group unit.

On the ultimate finding of employer intent, no express agreement to be bound by group action was required, see *NLRB* v. *Sightseeing Guides and Lecturers, Local 20076,* 310 F.2d 40, 42 (2d Cir. 1962), although that sometimes exists. Rather, as we have indicated in a slightly different context, "[a] history of multiemployer bargaining may suffice." *Publishers' Association of New York City* v. *NLRB,* 364 F.2d 293, 295 (2d Cir.), cert. denied, 395 U.S. 971 (1966). The facts set forth above, adequately supported by the record, show that there was more than enough history here of employer intent.[4] As to union reaction, the Examiner found that for some years bargaining had gone on between the Council and Local 338. Union acceptance of the group unit was therefore obvious.[5] The Council emphasizes that the employers signed separate contracts and that no employer formally authorized the Council to act upon its behalf for negotiating a contract or processing a grievance, even though the 1966 individual contracts provided a mechanism for doing so. There is no doubt that the Board considered these facts; the Examiner's opinion

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4 This proceeding is in sharp contrast to Council of Bagel and Bialy Bakers, 175 N.L.R.B. No. 148 (1969), heavily relied on by respondents, where the Board reversed the same Trial Examiner's finding of jurisdiction on a multiemployer basis. In *Bialy Bakers,* there was no substantial history of multiemployer bargaining.

5 It is true that Local 338 stated in 1966 that its contract was solely with individual employers rather than with the Council. However, that does not require reversal of the Board's finding that the Local accepted group bargaining, a proposition with which the Local agrees in this proceeding.

refers to them. Yet the Board concluded that the contrary evidence of intention to engage in group bargaining nonetheless was stronger. Based upon this record, that was a finding with which we should not interfere.

II.

We turn now to the other questions in the case. The Board found that in December 1966 the Council and Local 338 began bargaining for the 1967 contract. Between that time and January 31, 1967, the expiration date of the existing contract, a number of negotiating sessions were held. Local 338 sought no pay increase but only a two-year extension of the existing contract. Respondents claimed to be losing money because of increased competition from automated manufacturers, non-union shops and out-of-town producers shipping frozen bagels into the metropolitan area, and demanded a 40 per cent reduction in labor costs as a condition of a new agreement. Local 338 replied that it would consider a "roll back" in labor costs on the basis of individual demonstrated need. It therefore requested those Council members losing money either to allow Local 338 to examine their books or to bring in audits in support of their position. At one of the meetings, the Council indicated that it might take less than a 40 per cent cut but made no specific offer. Union negotiators told the Council:

> Bring your books to us. Bring an audit, accountant's report. Show us where you are losing money so we can guide ourselves and know in which direction we're going.

The Council's demand for a roll back and the union response were repeated at other meetings.

Opinion

In January, Council President Glass met privately with three Local 338 negotiators, and admitted that not all of the employers were losing money, "but certain of my members want to take advantage of this situation . . . they want this 40 percent reduction." At no time did the Council produce any records to buttress its call for a roll back. With regard to the union demand for a two-year contract, the Council countered by proposing a day-to-day, week-to-week, or at most a month-to-month, contract. At the climactic January 31 negotiation session, no agreement was reached. During that meeting, the Council took the position "no contract, no work." Local 338 representatives indicated that they did not intend to strike when the contracts expired and reaffirmed this position at a membership meeting early the next morning. However, when Local 338 members reported for work the next day, the respondent Council members were closed. The employers began operations again two days later with new employees and family members doing the work.

The Board found that the respondent employers had violated sections 8(a)(5) and 8(a)(1) of the Act by failing to bargain in good faith with Local 338, and that they had unlawfully locked out employee members of Local 338 and Local 802 on February 1, 1967, in violation of sections 8(a)(3) and 8(a)(1).[6] Respondents strenuously dispute these findings, claiming, among other things, that they did not engage in bad-faith bargaining, that there was no lockout and that they did not receive a full and fair hearing before the Board.

The Board's finding of bad-faith bargaining was based upon the Council's failure to produce records to support a

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6 The finding regarding Local 802 is discussed below in Part III of the opinion.

claimed inability to pay and upon its insistence on a contract of unreasonably short duration. There is no doubt that if these characterizations of the Council's conduct are accurate, they may properly be regarded as sufficient evidence of bad-faith bargaining. As to refusal to furnish information, we have only recently reviewed the cases in *NLRB* v. *General Electric Co.*, 418 F.2d 736, 749-53 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970). We there quoted from *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 152-53 (1936), that if a claim of inability to pay "is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." That observation was made regarding inability to pay an increase in wages; it applies a fortiori to an alleged need for a massive decrease. Similarly, insistence on a contract of unusually short duration can evidence bad-faith bargaining. *Solo Cup Co.* v. *NLRB*, 332 F.2d 447, 449 (4th Cir. 1964).

Thus, the issue before the Board was primarily factual, and it is on that level that the Council argues in this court. The Council claims, inter alia, that there never was any real demand for economic justification by the union, that the union knew anyway that production was declining rapidly in each shop, and that if anyone engaged in bad-faith bargaining, it was the union. However, there is substantial support in the record for the finding that constant union demands for economic data were made, and the Trial Examiner flatly rejected as "not credible" the contrary testimony of the Council's Financial Secretary. Local 338's awareness that production was generally declining was a far cry from knowing which, if any, of respondents could actually justify a 40 per cent wage cut. Finally, the claim that the union bargained in bad faith is simply not borne

out by the record. The union's acknowledgment of economic reality by not seeking a wage increase was evidence of that. Accordingly, we conclude that the Board's finding that the Council bargained in bad faith should be sustained.

The same factual attack is made on the finding that the respondent employers locked out their Local 338 employees on February 1. Respondents argue that there was no lockout because the employees themselves decided not to report back to work. However, before the Trial Examiner, the Council apparently admitted that Local 338 was locked out, but claimed that the lockout was legal. On this record, we would not set aside the factual determination that there was a lockout. As to its legality, respondents rely on *Detroit Newspaper Publishing Association* v. *NLRB,* 346 F.2d 527 (6th Cir. 1965), vacated, 382 U.S. 374 (1966). In that case, however, there was no finding, as there was here, that the lockout was part of an improper bargaining scheme and therefore violated section 8(a)(3) of the Act. Since the lockout in this case was in support of bad-faith bargaining and not merely to bring economic pressure to bear upon a legitimate bargaining position, it falls outside the conduct protected in *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965).

Respondents also claim that they did not receive a fair hearing because they were prevented from presenting crucial evidence and because the conduct and rulings of the Trial Examiner were improper and prejudicial. The rulings in question covered for the most part such matters as the admissibility of evidence and the scope of cross-examination. We have examined the rulings and they were well within the discretion of the Trial Examiner. Similarly, the comments of the Examiner were far short of showing the prejudice claimed.

Respondents also complain that the Examiner refused a 30-day continuance to allow Glass to testify following surgery. Glass had been present during the first week of hearings before the Board, and had engaged in negotiating sessions the day before the request for a continuance. The Examiner offered to take the testimony of Glass at his home. At the time, the lockout was in progress, the Board was contemporaneously seeking an injunction against respondents under section 10(j) of the Act, and the district court was deferring action on that petition until receipt of the record before the Examiner.[7] Before the Board, the only specific prejudice claimed by the Council was that Glass would have denied the admission attributed to him that not all Council members were losing money. At that time, the Council did not assert, as it does now in this court, that Glass would have testified regarding the existence of a multiemployer bargaining group.[8] Under all of these circumstances, we hold that there was no prejudicial abuse of discretion in the Examiner's ruling.

Respondents advance other arguments why the Board's order should not be enforced; e.g., the case is moot because the parties allegedly subsequently reached agreement and the employees returned to work. However, there are obviously back pay issues still to be determined and, in any event, on this record "the Board is entitled to have the resumption of unfair [labor] practices barred by an enforcement decree." See *NLRB* v. *Mexia Textile Co.*, 339

7 The injunction was granted with respect to Local 338 and denied as to Local 802. *Kaynard* v. *Bagel Bakers Council of Greater N. Y.*, 57 Lab. Cas. ¶12,499 (E.D.N.Y. 1968). It should be noted that, surgery completed, Glass did testify before the district court and his testimony was rejected as "implausible" and "somewhat incoherent and disjointed." *Id.* at 21,008 and n. 18.

8 Respondents made the same argument in this court in a motion to remand, which was denied in December 1969.

U.S. 563, 567 (1950). We also reject respondents' claim that two employers, Pops Bagel Bakery, Inc. and Rubenstein Bagels, Inc. should not be subject to the findings made against the Council. With respect to Pops, we find substantial evidence on the record that the Council had authority to bargain for Pops even if Pops was never an official member of that organization. Likewise, there is substantial evidence to support the Board's finding that both the corporate and partnership forms of Rubenstein constituted a single integrated business enterprise responsible for remedying the unfair labor practices. Finally, respondents point out that Nelson Bagel Bakery, Inc. was not named in the Local 338 complaint and hence failed to proffer the affirmative defense that its Local 338 employees were on strike at the time of the lockout. To expedite the matter and yet fairly preserve Nelson's rights, we order that Nelson be allowed to present this defense at the compliance proceeding, as the Board suggests, and that the burden of proof on this issue be the same as if Nelson were defending an unfair labor practice charge.

We have considered respondents' other arguments and conclude that none of them, except for those discussed in Part III below, justifies refusing to enforce the Board's order.[9]

III.

Finally, we consider the alleged violations of sections 8(a)(1) and 8(a)(3) with respect to Local 802. The Board found that contracts between Council members and

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9 The Board also found that the Council violated §8(d) of the Act by failing to give proper notice to the Federal Mediation and Conciliation Service and that this also made illegal the lockout of Local 338 employees. In view of our opinion, we do not believe it necessary to discuss and resolve the questions raised by this issue.

Locals 338 and 802 commonly expired on the same date. The practice was for the employers to bargain with Local 338 first and, when an agreement was reached, to begin negotiations with Local 802. Upon expiration of the 1966 contract, the Council President told a Local 802 official that the Council and Local 338 "were miles apart," and "[w]e can't use your drivers, notify your people we do not need them." On the following day, Local 802 received a telegram confirming this statement. Subsequent efforts by the drivers to work proved futile. The wholesale portions of respondents' businesses were sharply reduced, although not completely abandoned. Some wholesale customers picked up their own bagels while deliveries were made by owners, their families or employees who were not members of Local 802.

The Board concluded that Council members had locked out employees belonging to Local 802. It then found that the lockout was "part and parcel" of the lockout of Local 338 in support of the Council's unlawful bargaining with Local 338. The Board concluded that "[t]he lockout, therefore," constituted discrimination "not only against bakers, but against the drivers as well, and had the natural effect of discouraging membership in Local 802 within the meaning of section 8(a)(3) of the Act . . . ."

The Board's finding that the employers locked out members of Local 802 is supported by substantial evidence on the record. Nevertheless, we cannot agree with its conclusion that the lockout violated sections 8(a)(1) and 8(a)(3) of the Act. First, except for an attempted distinction of our decision in *NLRB* v. *Great Atlantic & Pacific Tea Co.*, 340 F.2d 690 (2d Cir. 1965), which is discussed below, the above quoted language of the Examiner constitutes the entire justification for the findings of dis-

criminatory intent and discouragement of union membership vis-a-vis Local 802, both of which are required by *A & P*. We would not hasten to enforce an order based upon such conclusory findings. Second, the scanty analysis offered by the Examiner does not withstand scrutiny. In light of the drivers' distinctly subsidiary bargaining position, it is not apparent on this record how locking them out substantially supported the Council's unlawful bargaining with the bakers. Moreover, even if locking out the drivers had that effect, it was still an action aimed at the bakers, by the Examiner's own reasoning, and accordingly discouraged membership in Local 338, not in Local 802. The lockout of the bakers was illegal because it was designed to implement illegal bargaining with Local 338. There was no finding, however, that respondents failed to bargain with the drivers; indeed, as the Examiner recognized, bargaining with them had not yet really begun. Had there been such a finding, the case would be different.

Finally, we must consider the effect on this case of *A & P, supra*. In that case, there was a dispute between a group of supermarkets and a meat cutters local, during which the employers locked out the meat cutters. Consequently, warehouse and bakery employees not involved in the initial dispute were left without work to perform and layoffs resulted. Although this court agreed with the Board that the lockout of the meat cutters had been illegal, we nevertheless reversed the finding of violations of sections 8(a)(1) and 8(a)(3) with respect to the layoff of warehouse and bakery employees. We rejected the Board's position that the required showing of improper motivation is met when the employer could reasonably anticipate that the lockout of one union could ultimately lead to the layoff of other employees: "foreseeability is not the

equivalent of discriminatory motivation." 340 F.2d at 694. We also rejected the Board's conclusion that

> since the secondary layoffs occurred contemporaneously with the Meat Cutter lockout and had the same economic impact, it would have to follow as night from day that the service employees would be discouraged from union membership.

Id. at 695.

Applying *A & P* to this case, it appears that the only basis for the finding of discouragement of union membership vis-a-vis Local 802 employees was the inference from contemporaneity that *A & P* found invalid. The Examiner distinguished *A & P* because in that case there was no "dispute" with the warehouse and bakery workers, and because the company there shut down all operations. We do not believe either alleged distinction justifies ignoring *A & P*. While the Examiner correctly noted that in this case "negotiations for a new contract [with the drivers] . . . were in order," he also acknowledged that respondents had not yet really begun to negotiate with the drivers. Hence, as in *A & P*, there was as yet no real dispute with the drivers. Similarly, although it is true that respondents "continued to operate, albeit on a reduced scale," it is also clear, as it was in *A & P*, that because of the economic realities flowing from the great reduction in business, for the most part the loss of wages by the drivers "can hardly be attributed to their union affiliation . . . and the consequences would have been the same whether or not they belonged to a union." 340 F.2d at 695. Perhaps the true basis for the Examiner's decision was his statement that, in any event, he did not regard himself as obligated

to follow *A & P*.[10] We are, however, bound by that decision, although we realize that section 8(a)(3) cases raise issues perhaps not yet fully resolved by the Supreme Court. See generally Christensen & Svanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L.J. 1269 (1968); Meltzer, The Lockout Cases, 1965 Sup. Ct. Rev. 87. Therefore, we hold that there is not substantial evidence on the record to support the Board's finding that the lockout by respondents "discriminated" against Local 802 employees, "thereby discouraging membership" in that Local, and its ultimate conclusion that sections 8(a)(1) and 8(a)(3) were thus violated.

Enforcement granted in part and denied in part.

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10 The Examiner noted that:

> In any event, and even assuming that this case is indistinguishable from *A & P, supra,* the Board has not indicated its acquiescence in that holding, and until it does so, or the question is put to rest by a decision of the Supreme Court, it is my duty to follow the Board's *A & P* decision.

APPENDIX B
Judgment

NATIONAL LABOR RELATIONS BCARD,

Petitioner,

v.

BAGEL BAKERS COUNCIL OF GREATER NEW YCRK and its EMPLOYER-MEMBERS, BAGEL BOX, INC., BAGEL TOWN, INC., BENSCN BAGEL BAKERY, CULVER BAGEL BAKERY, FAR ROCKAWAY BAGEL BAKERY, INC., FLATLANDS BAKERY, INC., GOLDEN BAGEL CORP., ISLAND PARK-NASSAU BAGEL BAKERY, LAURELTON BAGEL BAKERY, NELSON BAGEL BAKERY, INC., NEPTUNE BAGEL BAKERS, INC., RUBENSTEIN BAGELS, INC., JOSEPH RUBENSTEIN, MORRIS RUBENSTEIN and HERMAN REITER, CO-PARTNERS DOING BUSINESS AS RUBENSTEIN BAGELS, TRI-BOR BAGEL CO., INC., POPS BAGEL BAKERY, INC., and D & H BAGEL BAKERY,

Respondents.

BAGEL BAKERS COUNCIL OF GREATER NEW YORK AND ITS EMPLOYER-MEMBERS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 34,186

Judgment

Before: Lumbard, Chief Judge, Anderson and Feinberg, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board, and on a cross-petition for review of, an order of the National Labor Relations Board issued on February 19, 1969, and corrected on April 9, 1969, against Respondents (Bagel Bakers Council of Greater New York and its Employer-Members, Bagel Box, Inc., Bagel Town, Inc., Benson Bagel Bakery, Culver Bagel Bakery, Far Rockaway Bagel Bakery Inc., Flatlands Bagel Bakery, Inc., Golden Bagel Corp., Island Park-Nassau Bagel Bakery, Laurelton Bagel Bakery, Nelson Bagel Bakery, Inc., Neptune Bagel Bakers, Inc., Rubenstein Bagels, Inc., Joseph Rubenstein, Morris Rubenstein and Herman Reiter, copartners doing business as Rubenstein Bagels, Tri-Boro Bagel Co., Inc., Pops Bagel Bakery, Inc., and D & H Bagel Bakery, their respective officers, agents, successors and assigns.) The Court heard argument of respective counsel on September 21, 1970, and considered the briefs and transcript of record filed in this cause. On November 20, 1970 the Court being fully advised in the premises, handed down its opinion granting in part and denying in part enforcement of the Board's said order as corrected. In conformity therewith

IT IS ORDERED AND ADJUDGED by the Court that Respondents, Bagel Bakers Council of Greater New York and its Employer-Members, Bagel Box, Inc., Bagel Town, Inc., Benson Bagel Bakery, Culver Bagel Bakery, Far Rockaway Bagel Bakery, Inc., Flatlands Bagel Bakery, Inc., Golden Bagel Corp.,

Island Park-Nassau Bagel Bakery, Laurelton Bagel Bakery, Nelson Bagel Bakery, Inc., Neptune Bagel Bakers, Inc., Rubenstein Bagels, Inc., Joseph Rubenstein, Morris Rubenstein and Herman Reiter, co-partners doing business as Rubenstein Bagels, Tri-Boro Bagel Co., Inc., Pops Bagel Bakery, Inc., and D & H Bagel Bakery, their respective officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing, upon request, to bargain in good faith with Bagel Bakers Union Local 338, Bakery and Confectionery Workers International Union of America, (herein Local 338), as the collective bargaining representative of all employees in a unit of all bakers and kettlemen, including ovenmen, benchmen, fourth men, and jobbers in the employ of members of the Council, excluding all other employees and all supervisors as defined in Section 2(11) of the National Labor Relations Act, as amended, with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

(b) Refusing, upon request, to furnish Local 338 with data relating to the financial status and business operations of the employer members of the Council, and all other information necessary or relevant to collective bargaining negotiations between the parties.

(c) Demanding or insisting that any agreement negotiated with Local 338 be effective for no greater period than day-to-day, week-to-week, or at most month-to-month, or for any other period of unreasonable short duration.

(d) Locking out or terminating employees in the unit set forth in paragraph 1(a) above, in support of a demand for a contract of unreasonable short duration, or after failing to supply information of the nature described in paragraph 1(b) above.

(g) Discriminatorily locking out or terminating employees in the unit set forth in paragraph 1(a) above, in order to discourage membership in Local 338, or in any other manner discriminating in regard to the hire or tenure of employment or any other term or condition of employment of the employees in the aforementioned unit.

(h) In any other manner interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action found necessary and designed to effectuate the policies of the aforesaid Act:

(a) Upon request, through the Bagel Bakers Council of Greater New York, bargain collectively with Local 338 as the exclusive representative of the employees in the unit set forth in paragraph 1(a) above, with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, and if an understanding is reached, embody such understanding into a signed contract.

(b) Furnish to Local 338, upon request, financial date relating to the business operations of the members of the Council, as well as all other information necessary or relevant to the collective bargaining negotiations between said parties.

(c) Offer immediate, full and unconditional reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights, privileges, or working conditions, to their respective employees who are members of or represented by Local 338 in the unit set forth in paragraph 1(a) and (g), who were locked out or otherwise terminated on or about February 1, 1967, and make each such employee whole for any loss of earnings he may have suffered, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(d) Preserve, and upon request make available to authorized agents of the National Labor Relations Board, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in computing the amount of backpay herein provided.

(e) Notify each employee entitled to reinstatement pursuant to the provisions of paragraph 2(c) above, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended.

(f) Post at their respective places of business

where bagels are produced or sold, copies of the notice attached hereto marked "Appendix." Copies of said notice on forms provided by the Regional Director of the Twenty-Ninth Region of the Board (Brooklyn, New York), shall, after being signed by an authorized representative, be posted immediately upon receipt thereof and be so maintained for a period of sixty consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted, and take all reasonable steps necessary to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the aforesaid Regional Director in writing, within 10 days from the date of this Judgment, what steps the Respondents have taken to comply herewith.

s/ J. Edward Lumbard
Judge, United States Court of Appeals for the Second Circuit

s/ Wilfred Feinberg
Judge, United States Court of Appeals for the Second Circuit

FILED: